Supreme Court, U. S.
FILED
MAY 11 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1611

HERCOFORM, INC.

Petitioner

v.

CHICAGO TITLE INSURANCE CO.,
ET AL

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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1. OPINIONS BELOW

On February 28, 1977, the United States District Court for the Southern District of Maine issued its Judgment in this case. The ORDER is appended to this Petition as Appendix A. Defendant, Hercoform Incorporated, filed a Notice of Appeal on March 25, 1977. By its Opinion dated January 5, 1978, the United States Court of Appeals For The First Circuit issued an Opinion affirming the District Court's Order. A copy of the Opinion, which has not been reported, appears in Appendix B to this Petition.

2. JURISDICTION

The Opinion and Judgment of the United States Court of Appeals For The First Circuit was entered on January 5, 1978. By Application dated March 16, 1978, the Petitioner sought an Extension of Time within which to file a Petition for a Writ of Certorari. On March 21, 1978, Mr. Justice Brennan signed an Order extending time to file a Petition for a Writ of Certorari until and including May 15, 1978. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U.S.C. §1254(1).

3. QUESTION PRESENTED

Whether the choateness doctrine, created by this Court, should be extended to give priority to a federally guaranteed mortgage under the National Housing Act over a mechanics' lien which would otherwise be entitled to priority under State law, thereby unjustly enriching the govern-

ment at the expense of those who furnish labor and materials and increase the value of the subject property.

4. STATUTORY PROVISIONS

National Housing Act, 12 U.S.C.A. §§§1715 (c), 1701(t), 1710(a) and 1710(k)(1). See attached reprinted Appendix "C".

5. STATEMENT OF THE CASE

The facts are by stipulation of the parties and in abbreviated fashion appear as follows:

On September 29, 1971 the Plaintiff, Hercoform Incorporated, a sub-contractor, entered into a contract with Sherred Corp., a general contractor, to supply and erect modular housing units on land of Sherred Village Associates, in Bath, Maine. To help finance the project, Sherred Village Associates, an affiliated corporation with Sherred Corp., on May 2, 1972 mortgaged its premises to the New England Merchants National Bank, the mortgage being insured by the Department of Housing and Urban Development. commonly known as HUD. The Plaintiff, Chicago Title Insurance Company, insured the title.

At the completion of the project substantial sums were owed to Hercoform by way of retainage under the contract and for the current work completed. Hercoform timely filed, in the local registry of deeds, a mechanics' lien to which it was entitled under State law, and on December 20, 1973, after notification to the Bank and HUD, commenced a civil action in the

State Court to enforce its lien claim. While this case was pending, and as a result of the default on payments to the Bank, the Bank assigned its mortgage to HUD in accordance with the terms of its insuring agreement under the National Housing Act. Under State law, Hercoform's lien had priority over the mortgage.

The assignment was without recourse to the Bank except for a warranty that the mortgage assigned was prior to all mechanics' and materialmens' liens filed of record subsequent to the recording of the mortgage. In due course the Bank and the title company initiated a Petition for Declaratory Judgment in the United States District Court, District of Maine, seeking an adjudication as to the priority between the mortgage and the mechanics' lien. Jurisdiction in that Court vested under the provisions of Title 28 U.S.C. §1332 (Diversity of Citizenship), Title 28 U.S.C. §1331 (Federal Question) venue being established under Title 28 U.S.C. §1391. The District Court held that since the mechanics' lien was not choate at the time of the mortgage assignment to HUD, that the lien of the government became superior to the mechanics' lien with the practical result of terminating any liability of the bank or the title company under State law. This decision of the District Court was timely appealed to the United States Court of Appeals For The First Circuit. On January 5, 1978, that Court affirmed the decision of the District Court, saying in essence that while they were sorely tempted to fashion a rule of their own, to do so, they would have to find a substitute formula for the choateness doctrine and therefore joined with the five circuits that had adopted the

choateness doctrine in the non-tax federal lien cases as against the two circuits which had denied application of that doctrine. (See Opinion set forth in Appendix "B").

6. REASONS FOR GRANTING THE WRIT

A. CERTORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS.

As the Opinion below clearly sets forth (See Appendix "B"), there is a sharp and substantial conflict among the Courts of Appeal on the precise question presented in the case at bar.

The Court below held that Hercoform's lien was not entitled to priority over the Bank's mortgage assigned to HUD since Hercoform's lien was not sufficiently perfected under federal law at the time the mortgage contract was executed. (B-16, 23). The basis of the Court's holding was the application of the federal priority law -- first in time, first in right. In applying the first in time, first in right rule, the Court adopted the "choateness doctrine"--a lien's priority is determined by when it became choate. (B-23).

The choateness doctrine originated in the application of 31 U.S.C. §191 (Rev. Statutes §3466) giving priority to the United States in collection of certain debts from insolvents. The Supreme Court stated that the federal claim would defer only to prior "choate" liens. Spokane County v. United States, 279 U.S. 80, 49 S.Ct. 321, 73 L. Ed. 621 (1929). In order for the lien to be choate, the private lien holder must establish the identity of the lien holder, the property subject

to the lien, and the fixed amount of the lien. United States v. New Britian, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1953).

In United States v. Security Trust & Savings Bank, 340 U.S. 47, 71 S.Ct. 111, 95 L. Ed. 53 (1950), the Supreme Court applied the choateness doctrine to a priority dispute between federal tax liens and a state lien. Subsequently, the choateness doctrine was applied by some lower federal courts to disputes involving non-tax federal liens. (See cases cited in Footnote 4 of the Opinion Below --Appendix "B").

In response to the harsh results of the application of the choateness doctrine, the Congress, in 1966, amended the lien provisions of the Internal Revenue Code. The Federal Tax Lien Act provided, among other things, that certain private liens could attain priority over federal tax liens. 26 U.S.C. §6323, et seq. Thus, a mechanic's lien would have priority over a federal tax lien if, prior to the recordation of the tax lien, the mechanic's lien had become valid under State law against subsequent purchasers without actual notice and the lienor had commenced work on the project. 26 U.S.C. §6323(a) (h)(2).

Subsequent to the amendment of the Internal Revenue Code by the Tax Lien Act, the lower courts have struggled with the effect, on non-tax federal liens, of the emasculation of the choateness doctrine by the Tax Lien Act. Some Circuits have continued to apply the choateness doctrine in priority disputes involving non-tax federal liens. See, eg.,

United States v. General Douglas MacArthur Senior Village, Inc., 470 F.2d 675 (2nd Cir. 1972); T. H. Rodgers Lumber Co. v. Apel, 468 F.2d 14 (10th Cir. 1973); H. B. Agsten & Sons, Inc. v. Huntington Trust & Savings Bank, 388 F.2d 156 (4th Cir. 1967), cert denied 390 U.S. 1025 (1968). These cases basically limit the effect of the Tax Lien Act to cases involving a dispute between a tax lien and a private lien under state law. The cases argue that Congress could have and should have made further changes in the priority law if it had so desired.

Since the time of the 1966 Tax Lien Act, other Circuit Courts have refused to extend the doctrine of choateness to priority disputes involving non-tax federal liens. See Kimbell Foods, Inc., supra, 557 F.2d 491 (5th Cir. 1977); Ault v. Harris, 317 F.Supp. 373 (D. Alaska 1968, aff'd. sub. nom. Ault v. United States, 432 F. 2d 441 (9th Cir. 1970) (per curiam order). Those cases argue that the choateness doctrine was justifiable in the tax field where the government was an involuntary creditor. However, in the commercial loan area, the government is a voluntary creditor and can take self protection measures before making its investment. Furthermore, since the choateness doctrine has been substantially eroded in the tax lien area by the Tax Lien Act, and since tax collection is an essential governmental function, it would be anomalous to continue applying the choateness doctrine in areas less important to the preservation of the government. See Kimbell Foods, Inc., supra, at 500-03.

The Lower Court in the present case expressed severe doubts about the continued

viability of the choateness doctrine. The Court stated:

> "Choateness has proven a fatal handicap in the race between a mechanics' lienor and a federal lienor. It appears to serve no strong policy, since the federal lienor stands to be enriched by the increase in the property value caused by the work of the mechanics lienor while the latter stands without remedy. Moreover this built in advantage is not necessary to protect the federal investments; the government in mortgage lending and insuring may chose its debtors and set its terms." (App. "B" at 21, 23).

However, the First Circuit Court of Appeals decided not to go against the majority of Circuits which hold that the choateness doctrine is of continued vitality in the non-tax lien area. The Court apparently preferred to have either the Congress of the Supreme Court alter the choateness doctrine and clarify the area for all Circuits.

B. THE FIRST CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The issue of whether the doctrine of choateness should be applied in priority disputes involving non-tax federal liens is an important question of federal law which has not been settled by Congress and which should be settled by this Court. This Court has never addressed the issue.

Despite the fact that the First Circuit clearly expressed its sympathy with the plight of mechanic lienors strapped as they are with the judicial expansion of the doctrine of choateness to non-tax federal liens and gave its theoretical support to the minority position that the doctrine should not be thus expanded, the Court regrettably resorted to judicial buck-passing. The Court speculated that falling in with the majority position would more likely attract the interest of Congress which it felt was better equipped to deal with the issue, a consideration which did not deter the Fifth and Ninth Circuits from formulating a workable rule in situations analogous to that of the present case.

As far as Congressional action is concerned, it is an historical fact that the Congress is slow to act and its eventual action, if any, will not aid this Petitioner or the many other mechanic lienors pending such eventuality. Furthermore, historically the Congress has seldom acted as a result of a decision by a lower Court and has waited until this

Court has made a strong and clear pronouncement.

"More significantly, this is a judicially created doctrine whose limitations should be defined by this Court and not by Congress. In the absence of controlling decisions or an Act of Congress to the contrary, it is for the federal courts to fashion the governing rule of law according to their own standards. Clearfield Trust v. United States, 318 U.S. 363, 367, 63 S. Ct. 573, 87 L.Ed. 838." Ault v. Harris, 317 F.Sup., 373, 376 (D. Alaska, 1968), as affirmed in Ault v. United States, 432 F.2d. 441 (9th Cir. 1970).

The judiciary is very well-equipped to answer this question. This Court need only address the very limited question of a priority dispute between a state created mechanic's lien and a mortgage lien assigned to HUD under the National Housing Act. This Court has in the past demonstrated a willingness and an ability to deal with questions having far greater impact upon society and requiring much more of a legislative effort than the deciding of the question presently before this Court. C.f. Baker vs. Carr, 369 U.S. 186 (1962). Furthermore, as hereinbefore pointed out, the facts and policy considerations necessary to support a well-reasoned answering of this question have already been recognized and articulated by the Fifth and Ninth Circuit Courts.

Even the First Circuit Court acknowledged that high priority should be afforded to the reimbursement of those

whose services have enhanced the value of the mortgaged property upon which work was performed (Appendix, Page 21). Likewise, the First Circuit Court was capable of recognizing that providing priority to non-tax federal liens is not necessary to protect the federal investment since the government in mortgage lending and insurance may choose its debtors and set its own terms. (Appendix, Page 22).

Significantly, Congress has already at least impliedly expressed its intention that mechanic's lienors working on HUD insured projects be paid and protected. In the National Housing Act , 12 USCS, §1701, et. seq., the law authorizing and defining HUD's activiities in the current dispute, Congress manifested this intention in several sections: In §1715(c) Congress required that prior to the issuance of any insurance by the secretary of HUD, the principal contractor must file a certificate certifying that laborers and mechanics employed in the construction of the dwellings are being paid not less than the prevailing wage of the locality for similar work. It would be indeed ironic for Congress to take the pains to insure that mechanics are paid an adequate wage in HUD insured construction projects and still intend, under an application of the choateness doctrine, that the same mechanics should go entirely without pay if the owner defaults upon its obligation which would ultimately be assigned to HUD.

In §1701(t) of the National Housing Act, Congress confirmed the national housing goal of a decent home for each

American family and emphasized the capability and resources of private enterprise in realizing this goal. The Congressional goal of utilizing private enterprise in HUD projects is certainly not furthered by an extention of the doctrine of choateness to non-tax federal liens, thereby rendering any investment made by the private sector extremely hazardous.

Sections 1710(a) and 1710(k)(1) both provide that upon the assignment of the obligation to HUD, HUD is to pay the mortgagee for amounts expended by the mortgagee, in addition to the unpaid balance of the principle loan, on such items as taxes, ground rents, and water rates which are liens prior to the mortgage, charges for the maintenance and repair of the mortgaged property, and reasonable payments made for the purpose of protecting, operating, or preserving the mortgaged property. In these sections the Congress has manifested an intention to reimburse those parties responsible for enhancing the value of the mortgaged property. It seems unlikely that the Congress would have intended to rest the reimbursement of these necessary expenditures upon the arbitrary or whimsical decision of the mortgagee to pay them itself prior to assignment, realizing that if the mortgagee did not satisfy these necessary expenses prior to the assignment of the mortgage, the application of the choateness doctrine to non-tax federal liens would preclude the subsequent reimbursement of these mechanics.

CONCLUSION

WHEREFORE, the Petitioner prays that a Writ of Certiorari be granted to resolve a conflict among the Circuits involving an important question of Federal law which equity and justice demand be decided by this Court.

Respectfully submitted,

Charles W. Smith, Sr.

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SOUTHERN DIVISION

* * * * * * * * * * * * * * * * *

CHICAGO TITLE INSURANCE COMPANY, ET AL,	*	Civil Action
	*	76-56-SD
Plaintiffs	*	
v.	*	
SHERRED VILLAGE ASSOCIATES, ET AL,	*	
Defendants	*	

* * * * * * * * * * * * * * * * *

ORDER ON DECLARATORY JUDGMENT

Hearing having been held on Plaintiffs' complaint for declaratory judgment and upon the stipulation of facts agreed to by the parties, the Court having considered the written briefs and oral arguments presented by the parties, and the Court having made findings of fact and reached conclusions of law, it is hereby

ORDERED, ADJUDGED AND DECLARED that:

The mortgage granted by Sherred Village Associates to New England Merchants National Bank dated May 2, 1972 and recorded in the Sagadahoc Counry Registry of Deeds, Volume 382, Page 312, said mortgage having been assigned to the

Secretary of Housing & Urban Developement by assignment dated December 19, 1974 and recorded in said Registry of Deeds, Book 402, Page 37, is found and declared to be superior to the lien claimed by Hercoform Incorporated in its lien action now pending in the Sagadahoc County Superior Court (Docket #2265), and that said mortgage is entitled to priority over said lien and lien claim.

Costs are awarded to the Plaintiff against Hercoform Incorporated.

/s/ Edward T. Gignoux
United States District
Court Judge

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 77-1157

CHICAGO TITLE INSURANCE COMPANY, et al,

PLAINTIFFS, APPELLEES,

v.

SHERRED VILLAGE ASSOCIATES, et al,

DEFENDANT, APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before

COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*,
WOLLENBERG, *District Judge.**

Charles W. Smith, with whom *Smith, Elliott, Wood & Nelson, P.A.*, was on brief, for appellant.

John W. Philbrick, with whom *Verrill & Dana*, was on brief, for appellees Chicago Title Insurance Company and New England Merchants National Bank.

Thomas G. Wilson, Attorney, Appellate Section, Civil Division, Department of Justice, with whom *Barbara Allen Babcock*, Assistant Attorney General, *Peter Mills*, United States Attorney, and *Ronald R. Glancz*, Attorney, Appellate Section, Civil Division, Department of Justice, were on brief, for appellee Secretary of Housing and Urban Development.

January 5, 1978

COFFIN, *Chief Judge*. Hercoform Incorporated, subcontractor on a housing project in Maine, appeals from a decision that the federal government's mortgage lien has priority over Hercoform's mechanic's lien to proceeds

*Of the Northern District of California, sitting by designation.

from a forthcoming foreclosure. Hercoform contracted to provide and erect prefabricated housing units for the moderate income residential housing project in 1971. In 1972, the developer obtained mortgage financing for the project from the New England Merchants National Bank, whose loan was insured by the Department of Housing and Urban Development pursuant to its authority under Section 236 of the National Housing Act (12 U.S.C. § 1715Z-1(j)). A regulatory agreement between HUD and the developer was recorded along with the mortgage on the day the latter was executed. Chicago Title Insurance Company insured the developer's title in the mortgaged property for the benefit of the Bank.

Hercoform did not record notice of its lien until after its work on the project was completed in 1973. Under the applicable state law there was no need for Hercoform to record the notice before then. On the same day the lien was recorded Hercoform brought suit in state court to enforce its claim.

When the developer defaulted on his payments in 1974, the Bank, pursuant to its rights under the insurance agreement, assigned its mortgage to HUD. In the assignment the Bank warranted to HUD that the mortgage would have priority over all liens recorded after the date on which the mortgage had been filed. Chicago Title insured the Bank's obligations under the warranty.

Under state law Hercoform's lien has priority over the mortgage, since Hercoform's contract was executed before the mortgage was.[1] Seeking to avert the entry of a judgment to that effect in Hercoform's pending state court suit, the Bank and Chicago Title brought suit under the Declaratory Judgment Act (28 U.S.C. § 2201) in the United States District Court for the District of Maine.

[1] 10 M.R.S.A. § 3251; *Saucier* v. *Maine Supply & Garage Co.*, 109 Me. 342, 84 A. 461 (1912).

The relief sought was a declaration that the government's mortgage lien was entitled to priority over Hercoform's mechanic's lien. Hercoform and HUD were named as defendants.

Hercoform moved to dismiss the federal suit on the ground that the plaintiffs lacked standing. The plaintiffs lost their standing, according to Hercoform, when the Bank assigned its mortgage to HUD. The district court, however, denied the motion and, after reviewing the merits, granted the relief which the plaintiffs were seeking.

On appeal Hercoform contends, as it did before the district court, that plaintiffs do not meet the "prudential" rule of standing which requires that the legal rights or interests for which protection is sought be those of the party asserting them, not of a third person. See *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975). As a result, though, of the warranty given by the Bank in its assignment to HUD and guaranteed by Chicago Title, plaintiffs do have a legal interest in the outcome of this suit. If Hercoform's lien were held to have priority over HUD's, plaintiff would be liable for breach of warranty and would thereby be legally responsible for any financial loss which HUD might suffer as a result. Consequently, we agree with the district court that plaintiffs did have standing to raise the lien priority issue.

We now turn to the substantive issue. When, as here, there is no governing legislation, federal courts have traditionally applied the federal common law principle that "the first in time is the first in right" to priority disputes involving federal liens.[2] This principle was first enunciated by the Supreme Court in *Rankin* v. *Scott*, 25

[2] See, e.g., *Meyer* v. *United States*, 375 U.S. 233, 236 (1963), *United States* v. *New Britain*, 347 U.S. 81, 85 (1954), *United States* v. *Ringwood Iron Mines, Inc.*, 251 F.2d 145, 146-147 (3rd Cir.) *cert. denied* 356 U.S. 974 (1958), *United States* v. *Latrobe Construction Company*, 246 F.2d 357, 365 (8th Cir., 1957).

U.S. (12 Wheat.) 177 (1827), a case involving a priority dispute between two state-created judgment liens. In resolving the dispute, the Court stated:

> "The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds . . . ." *Id.* at 179.

The Supreme Court has since applied the "first in time" rule in a series of cases during the 1950's and early 1960's involving priority disputes between federal tax liens and various kinds of nonfederal liens.[3] With regard to the nonfederal liens, the Court established a federal common law rule to determine when they arose rather than using the dates the liens arose under state law. The Court stated that the determination of when a nonfederal lien "acquired sufficient substance and has become so perfected as to defeat a later-arising . . . federal tax lien" should be governed by federal law. "'Otherwise, a state court could affect the standing of federal liens, contrary to the established doctrine [that the effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question].'" *United States* v. *Pioneer American Insurance Company*, 374 U.S. 84, 88-89 (1965), quoting *United States* v. *New Britain*, 347 U.S. 81, 86 (1954); *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 49 (1950).

The federal rule adopted by the Court for determining when a nonfederal lien arose for "first in time" purposes was the choateness doctrine; i.e. that a lien's priority was measured from the time it became choate. A lien became choate when the identity of the lienor, the property

[3] See, *e.g.*, *United States* v. *Vermont*, 377 U.S. 351, 358 (1964); *United States* v. *Pioneer American Insurance Company*, 374 U.S. 84, 87 (1963); *United States* v. *Acri*, 348 U.S. 211, 213 (1955); *New Britain, supra*, 347 U.S. at 85.

subject to the lien, and the amount of the lien were all established. *New Britain, supra*, 347 U.S. at 84. Normally, the amount of a lien is not fixed until the debtor has exhausted his opportunities to challenge the amount. Thus, to render his lien choate, the lienor must usually reduce his claim to a judgment. See, *e.g.*, *United States* v. *White Beer Brewing Company*, 350 U.S. 1010 (1956), *United States* v. *Vermont*, 377 U.S. 351, 358-59 (1964). Using the date a lien became choate as the date it arose for "first in time" purposes virtually guaranteed the federal tax lien's priority in order-of-priority disputes, especially those involving mechanics' lienors, who rarely reduced their claims to judgment until after they had completed their work on a project. See, e.g., *White Beer Brewing Company, supra*, 350 U.S. at 1010 (dissenting opinion); *see Kimbell Foods, Inc.* v. *Republic National Bank of Dallas*, 557 F.2d 491, 499 (5th Cir., 1977); W. Plumb, *Federal Liens and Priorities-Agenda For The Next Decade*, 77 Yale L.J. 228, 229-30 (1967).

Following the Supreme Court's application of the "first in time" and "choateness" doctrines in federal tax lien cases, several lower federal courts extended the application of these doctrines to disputes involving non-tax federal liens.[4] In 1966, however, partly in response to the Supreme Court's use of the choateness doctrine, Congress amended the lien provisions of the Internal Revenue Code. One of the primary purposes of the Federal Tax Lien Act of 1966 was to up-date the tax lien laws to be consistent

[4] See, *e.g.*, *United States* v. *Oswald & Hess Co.*, 345 F.2d 886 (3rd Cir., 1965) (Small Business Administration Mortgage Lien); *United States* v. *County of Iowa*, 295 F.2d 257 (7th Cir., 1961) (Reconstruction Finance Corporation mortgage lien); *United States* v. *Roessling*, 280 F.2d 933 (5th Cir., 1960) (mortgage lien under Emergency Relief Appropriation Act of 1935); *Southwest Engine Co.* v. *United States*, 275 F.2d 106 (10th Cir., 1960) (Small Business Administration chattel mortgage lien).

with commercial practice as it had evolved in the states, which through the enactment of mechanics' lien laws had generally given high priority for reimbursement to those whose services enhanced the value of the property upon which they worked. *S. Rep. No.* 1707, 89th Cong., 2nd Sess. (1966), 3 U.S. Code Cong. & Ad. News 3722-25 (1966); *Reports of the Special Committee on Federal Liens,* 83 A.B.A. Rpts. 453-54, 457 (1958) (hereafter, *Special Committee*). Under the amended provisions, a mechanic's lien had priority over a federal tax lien if, prior to the recordation of the tax lien, the mechanic's lien had become valid under state law against subsequent purchasers without actual notice and the lienor had commenced work on the project. 26 U.S.C. §§ 6323(a) and (h)2.

Since the enactment of the 1966 Tax Act, the Circuits have split on the issue of whether the doctrine of choateness should continue to be applied in priority disputes involving non-tax federal liens. The Second, Fourth and Tenth Circuits have continued to apply choateness, primarily on the grounds that: (1) the Tax Act on its face and in its legislative history is limited in scope to federal tax liens, (2) Congress was aware of lower federal court decisions extending choateness to cases involving non-tax federal liens and, therefore, would have acted in these other areas too if it had intended that choateness no longer be applied there, (3) the Tax Act of 1966 is merely the latest in a series of Acts "designed to effect precisely limited expansions of categories of secured creditors protected from secret federal tax liens", and (4) Congress, because of its fact-gathering facilities, is better equipped than the judiciary to gauge the impact of a decision to waive the priority to which federal non-tax liens are generally entitled to now *United States* v. *General Douglas MacArthur Sr. Vil. Inc.*, 470 F.2d 675, 679 (2nd Cir., 1972); *T.H. Rodgers Lumber Company* v. *Apel*, 468 F.2d 14, 17-

20 (10th Cir., 1973); *H.B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank*, 388 F.2d 156, 160 (4th Cir., 1967), *cert. denied*, 390 U.S. 1025 (1968).

The Fifth and Ninth Circuits contend, however, that although the application of choateness may have been justifiable in the field of tax, where the government is an involuntary creditor, its application is not justifiable where the federal government voluntarily extends credit. In the commercial loan area, the government is able to take steps before disbursing funds to protect its investment. Second, since the reliance on choateness has been substantially diminished[5] in the area of tax collection — a governmental function necessary to the very existence of our government and its programs, and also the area in which the doctrine originated — it would be anomalous to continue applying it in areas less central to the preservation of the government. *Kimbell Foods, Inc., supra* 557 F.2d at 500-03; *Ault* v. *Harris*, 317 F. Supp. 373, 374-76 (D. Alaska, 1968), *aff'd sub. nom. Ault* v. *United States*, 432 F.2d 441 (9th Cir. 1970) (per curiam order).

Technically, there being no legislation or Supreme Court opinions governing the non-tax federal lien-mechanics' lien dispute before us, and no circuit precedent, we are free to fashion our own rule. We are sorely tempted to do so. Choateness has proven a fatal handicap in the race between a mechanic's lienor and a federal lienor. It appears to serve no strong policy, since the federal lienor stands to be enriched by the increase in the property value caused by the work of the mechanic's lienor, while the

[5] The lien provisions of the Internal Revenue Code still do not contain priority rules which govern the tax lien's priority with respect to every single kind of nonfederal lien. See 26 U.S.C. § 6323. Therefore, the Supreme Court cases applying the choateness doctrine to federal tax lien — nonfederal lien priority disputes would still seem to be good law in those disputes not governed by the Code.

latter stands without remedy. Moreover, this built-in advantage is not necessary to protect the federal investment; the government in mortgage lending and insuring may choose its debtors and set its terms.

What makes us resist the temptation to announce our own rule is our skepticism that, in this arena of complex relationships intimately affected by both federal and local law, we would make any valuable contribution by adding a further complication. Where the circuits stand, before our decision, at five for choateness and two against, we think that changing the count to six and two may increase the chances of attracting the interest of Congress, if there is sustained demand for reform. While the doctrine was given birth by the Supreme Court, Congress has taken its first bite at reform in the Tax Act of 1966. We cannot avoid feeling that there is much that we do not know about the equities, effects of various rules, and relative ability of the federal and local lienors to protect themselves.[6]

What dissuades us in particular from joining the Fifth and Ninth Circuits is that we would not merely be siding with one camp, making the split in the circuits a bit more even. We would, having decided not to rely on the traditional requirement of choateness in determining the cognizable timing of a mechanic's lien, have to adopt a substitute formula. We would have difficulty in following the Fifth Circuit in *Kimbell Foods, supra,* which applied local law, the Uniform Commercial Code, to a privately

[6] For example, it would seem that decisions such as (1) whether priority of federal liens should be subject to the impermanent policy decisions of state legislatures and (2) to what extent participation by private financial institutions, a primary goal of the National Housing Act, is dependent upon a rule favoring federal liens could be more equitably and intelligently made after Congressional hearings, rather than after a trial between a limited number of litigants.

held secured interest. This device fitted the case admirably, since the U.C.C. is of general, nationwide application, with no quixotic parochial variations. Recourse to the local law governing mechanics' liens, however, would incorporate many local eccentricities.[7] This fact led the Ninth Circuit in *Ault, supra,* to adopt the rule of the Tax Act, *i.e.,* adopting local law except where the mechanic's lienor has not commenced work prior to the recordation of the federal lien. Application of this rule, though, would not only require HUD to concern itself with the varying state laws, but would require contractors to be aware of the possible applicability of two sets of rules.

Were we to carve out our own approach which differed from the court in *Ault,* we would have succeeded only in further complicating a minefield which badly needs some Congressional sapping. In sum, we cannot fault the district court for having chosen the majority rule.

Accordingly, we affirm the district court's decision against the mechanic's lienor because the lien did not become choate before the federal lien arose.[8]

Affirmed.

[7] Depending upon the state involved, a subcontractor's lien may arise when he commences work on the project, when the general contractor commences work, when the subcontractor executes his contract, or the lienor may even be entitled to a superpriority, giving him higher priority than a mortgage lienor regardless of whether the mortgage was recorded before the contractor's work was commenced or his contract executed. W. Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II,* 77 Yale L.J. 605, 677 (1968); *Special Committee, supra,* 83 A.B.A. Rpts. at 457, 494.

[8] Hercoform's reliance on the "circular lien theory" is without merit because there are only two liens involved in this case. *Compare H.B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank,* 388 F.2d 156 (4th Cir. 1967).

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APPENDIX C

§1701t. Congressional affirmation of national housing goal

The Congress affirms the national goal, as set forth in section 2 of the Housing Act of 1949 [42 USCS § 1441], of "a decent home and a suitable living environment for every American family."

The Congress finds that this goal has not been fully realized for many of the Nation's lower income families; that this is a matter of grave national concern; and that there exist in the public and private sectors of the economy the resources and capabilities necessary to the full realization of this goal.

The Congress declares that in the administration of those housing programs authorized by this Act which are designed to assist families with incomes so low that they could not otherwise decently house themselves, and of other Government programs designed to assist in the provision of housing for such families, the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality; and in the carrying out of such programs there should be the fullest practicable utilization of the resources and capabilities of private enterprise and of individual self-help techniques. (Aug. 1, 1968, P.L. 90-448, § 2, 82 Stat. 476.)

1710. Payment of insurance.--(a) In any case in which the mortgagee under a mortgage insured under section 203 [§1709 of this title] shall have foreclosed and

taken possession of the mortgaged property in accordance with regulations of, and within a period to be determined by, the Secretary, or shall, with the consent of the Secretary, have otherwise acquired such property from the mortgagor after default, the mortgagee shall be entitled to receive the benefit of the insurance as hereinafter provided, upon (1) the prompt conveyance to the Secretary of title to the property which meets the requirements of rules and regulations of the Secretary in force at the time the mortgage was insured, and which is evidenced in the manner prescribed by such rules and regulations, and (2) the assignment to him of all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction or foreclosure proceedings, except such claims as may have been released with the consent of the Secretary. Upon such conveyance and assignment the obligation of the mortgagee to pay the premium charges for insurance shall cease and the Secretary shall, subject to the cash adjustment hereinafter provided, issue to the mortgagee debentures having a total face value equal to the value of the mortgage and (subject to sub-section (e) (2) a certificate of claim, as hereinafter provided. For the purposes of this subsection, the value of the mortgage shall be determined, in accordance with rules and regulations prescribed by the Secretary, by adding to the amount of the original principal obligation of the mortgage which was unpaid on the date of the institution of foreclosure proceedings, or on the date of the acquisition of the property after default other than by foreclosure, the amount of all payments which have been made by the mortgagee for

taxes, ground rents, and water rates, which are liens prior to the mortgage, special assessments which are noted on the application for insurance or which become liens after the insurance of the mortgage, charges for the administration, operation maintenance and repair of community-owned property or the maintenance and repair of the mortgaged property, the obligation for which arises out of a covenant filed for record and approved by the Secretary prior to the insurance of the mortgage, insurance on the mortgaged property, and any mortgage insurance premiums, and any tax imposed by the United States upon any deed or other instrument by which said property was acquired by the mortgagee and transferred or conveyed to the Secretary, and by deducting from such total amount any amount received on account of the mortgage after either of such dates, and any amount received as rent or other income from the property, less reasonable expenses incurred in handling the property, after either of such dates;...

1710 (k) [j] Notwithstanding any other provision of this section or of section 604 or 904 [§§ 1739, 1750c of this title] and with respect to any debentures issued in exchange for properties conveyed to and accepted by the Secretary after the effective date of the Housing Act of 1959 [Sept. 23, 1959] in accordance with such sections [§§ 1739, 1750c of this title], the Secretary may (1) include in debentures reasonable payments made by the mortgagee with the approval of the Secretary for the purpose of protecting, operating, or preserving the property, and taxes imposed upon any deed or any other instrument by which the property was acquired by the mortgagee and transferred or conveyed to the Secretary;

1715c. Labor standards -- Requirements. --(a) The Secretary [of Housing and Urban Development] shall not insure under section 207 [§1713 of this title] or section 210 of this title or under section 608 of title VI [§1743 of this title] pursuant to any application for insurance filed subsequent to the effective date of this section, or under section 213 of this title [§1715e of this title], or under Title VII [§1747-17471 of this title] pursuant to any application filed subsequent to sixty days after the date of enactment of the Housing Act of 1950 [Apr. 20, 1950], or under section 803 or 810 of title VIII [§§ 1748b, 1748h-2 of this title], or under section 908 of title IX [§1750g of this title], a mortgage or investment which covers property on which there is or is to be located a dwelling or dwellings, or a housing project, the construction of which was or is to be commenced subsequent to such date, unless the principal contractor files a certificate or certificates (at such times, in course of construction or otherwise, as the Secretary [of Housing and Urban Development] may prescribe) certifying that the laborers and mechanics employed in the construction of the dwelling or dwellings or the housing project involved have been paid not less than the wages prevailing in the locality in which the work was performed for the corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a--276a-5) [40 §§ 276a--276a-5], prior to the beginning of construction and after the date of the filing of the application for insurance. The provisions of this section shall also apply to the

insurance of any loan or mortgage under section 220 or section 233 [§§1715k, 1715x of this title] which covers property on which there is located a dwelling or dwellings designed principally for residential use for twelve or more families. The provisions of this section shall apply to the insurance under section 221 [§17151 of this title] of any mortgage described in subsection (d)(3) or (d)(4) [§17151 (d)(3) (4)] and (deeming the term "construction" as used in the first sentence of this subsection to mean rehabilitation) of any mortgage described in subsection (h) (1) or section 235(j)(1) [§1715z(j)(1) of this title] which covers property on which there is located a dwelling or dwellings designed principally for residential use for more than eight families; except that compliance with such provisions may be waived by the Secretary--....

CERTIFICATE OF SERVICE

I, Charles W. Smith, a member of the Bar of the Supreme Court of the United States and counsel of record for Hercoform Incorporated, Petitioner herein, hereby certify that on May 11, 1978, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition For a Writ of Certorari on each of the parties herein, as follows:

On Chicago Title Insurance Company and New England Merchants National Bank, Respondents herein, by depositing such copies in the United States Post Office, Saco, Maine, with first class postage prepaid, properly addressed to the post office address of John W. Philbrick, Esq., the above-named Respondents counsel of record at Verrill & Dana, Two Canal Plaza, Portland, Maine 04112.

On the Secretary of Housing and Urban Development, Respondent herein, by depositing such copies in the United States Post Office, Saco, Maine, with first class postage prepaid, properly addressed to the post office address of Thomas G. Wilson, Esq., the above-named Respondent's counsel of record at Appellate Sec. Civ. Div., Department of Justice, Washington, D.C. 20530.

On the United States of America, Respondent herein, by depositing such copies in the United States Post Office, Saco, Maine, with first class postage prepaid, properly addressed to the post office address of Wade H. McCree, Solicitor General, the above-named Respondent's counsel of record at Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served.

Dated: May 11, 1978.

Charles W. Smith, Esq.
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199 Main Street
Saco, Maine 04072